IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ANTONIO SOLIS, JUAN SOLIS, and JUAN RANGEL, individually and on behalf of all others similarly situated, Plaintiffs,	)	Case No. 20-cv-02348
-vs-	)	Chicago, Illinois
	)	March 23, 2022
HILCO REDEVELOPMENT LLC, et al., Defendants.	)	10:18 a.m.

TRANSCRIPT OF TELEPHONIC PROCEEDINGS
BEFORE THE HONORABLE MARTHA M. PACOLD

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PROCEEDINGS REPORTED BY CERTIFIED STENOGRAPHER
TRANSCRIPT PRODUCED WITH A COMPUTER

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(Proceedings heard in open court:)

THE COURTROOM DEPUTY: Good morning. The United States District Court for the Northern District of Illinois is now in session, the Honorable Martha M. Pacold presiding.

10:18:22 20 C 2348, Solis versus Hilco Redevelopment. Counsel, if you can state your name for the record, we'll start with plaintiffs' counsel.

MR. RAUSCHER: Good morning. Scott Rauscher for the plaintiffs.

10:18:41 MR. RYAN: Good morning, your Honor. This is Brendan Ryan on behalf of defendants, Hilco Redevelopment, LLC, HRE Crawford, LLC, and HRP Exchange 55, LLC.

MR. DEVRIES: Good morning, your Honor. This is Edward Devries from Wilson Elser on behalf of MCM Management.

10:19:03 MR. LYMAN: Good morning, your Honor. This is Tom Lyman, L-Y-M-A-N, on behalf of Marine Technology Solutions.

MR. RICE: Good morning, your Honor. Andrew Rice on behalf of Controlled Demolitions, Inc.

THE COURT: All right. Good morning, everyone.

10:19:24 Can I just ask is there anyone else who's planning to participate in the hearing?

All right. Thanks. Sounds like we have everyone then.

Let me first just say thank you for your patience

10:19:41 with the rescheduling of the hearing and also with starting a

little bit late this morning.

Let me also just ask if you're not speaking if you could please just mute your line. That would -- that would make things easier in case there's any kind of feedback.

10:20:02 Let me also before I -- so we're here for a ruling on the motion to dismiss, and I am prepared to proceed to the ruling. Before I do that, let me just ask is there anything about the status of the case or any type of developments that you'd like to bring to my attention before I turn to the

10:20:30 ruling?

MR. RYAN: On behalf of the Hilco defendants, we don't have anything, your Honor.

MR. RAUSCHER: That would be the same for plaintiffs, Judge.

10:20:53 THE COURT: Okay.

MR. DEVRIES: Nothing from MCM. Thank you.

THE COURT: Thanks then, and I'll go ahead and turn to the ruling then.

Let me also just say up front about the format of the

10:21:04 hearing or, I'm sorry, of the ruling, that I will be giving the ruling from the bench today and I will give my reasons from the bench.

And so first of all, I just appreciate your bearing with me because it will take some time to walk through the

10:21:23 ruling and the reasoning.

I also wanted to let you know that I will be giving all my reasons from -- during the ruling today on the record. I do not plan to issue a separate written order, and the reason for that is just speed. I can get you a decision faster with this format, and so that's really why I'm doing that.

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So if anyone needs the reasoning, then I would recommend that you order the transcript. I will issue a minute entry that summarizes and gives the bottom line, but the reasoning will be on the record here.

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So with that, let me then turn to the ruling. And, again, I'll just ask for your patience as I walk through it.

Plaintiffs Antonio Solis, Juan Solis, and Juan Rangel brought this putative class action against defendants who were involved in the demolition of a smokestack in the Little Village neighborhood of Chicago.

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Plaintiffs allege that the April 2020 smokestack demolition towards the beginning of the COVID pandemic resulted in a toxic dust cloud that coated Little Village and caused harm to plaintiffs and the putative class. Defendants have moved to dismiss all of plaintiffs' eight claims.

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And I will give reasons for each of these particular claims, but just to summarize up front, I will grant in part and deny the motion.

So Counts I, ultra hazardous activity, II,

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negligence, and IV, private nuisance, may proceed.

Count V, trespass, is dismissed without prejudice to the extent that it sounds in intentional trespass, but the claim may go forward as a negligent trespass claim.

10:23:33 Counts VI for battery and assault, or assault and battery, VII, medical monitoring, and VIII, Title VI, are dismissed without prejudice in their entirety for all plaintiffs.

Count III, negligent infliction of emotional

10:24:00 distress, is dismissed without prejudice as to plaintiff -- plaintiffs Jose Solis and Juan Rangel but survives for plaintiff Antonio Solis.

Going forward then are the following claims: For Antonio Solis: Count I, ultrahazardous activity; Count II,

10:24:28 negligence; Count III, negligent infliction of emotional distress; Count IV, private nuisance; Count V, negligent trespass.

For plaintiff Jose Solis: Count I, ultrahazardous activity; Count II, negligence; Count IV, private nuisance;

10:24:48 Count V, trespass, negligent trespass.

For plaintiff Juan Rangel: Count I, ultrahazardous activity; Count II, negligence; Count IV, private nuisance; Count V, negligent trespass.

The remaining counts are dismissed.

10:25:05 Because this is the first dismissal of any claims,

all dismissals are without prejudice, and plaintiffs will be given an opportunity to amend their complaint. This case has already been referred to Judge Harjani for discovery and settlement. I will expand that referral to include setting deadlines for amended pleadings.

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I will also direct the parties to exhaust settlement possibilities in light of this ruling, and then I will ask the parties to submit a joint status report on the case generally and to include any update on settlement by six weeks from today.

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So that's the summary, and I'll now walk through the details.

In terms of the background and the factual allegations, those allegations are in the first amended complaint, and so I'm going to assume that the parties are familiar with that complaint. I'm assuming all well-pleaded facts alleged in the complaint are true. I am construing them in the light most favorable to plaintiffs.

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I will then turn to the legal standard.

When reviewing a motion to dismiss under Rule 12(b)(6), as I mentioned, I accept as true all factual allegations in the complaint and draw all permissible inferences in plaintiffs' favor.

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To survive a motion to dismiss, a plaintiff must allege enough facts to state a claim to relief that is

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plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the Court to draw the reasonable inference that the defendant is liable for the misconducts alleged.

10:27:03 Federal pleading standards do not require detailed factual allegations, but they require more than an unadorned, the-defendant-unlawfully-harmed-me accusation. Naked assertions devoid of further factual enhancement are insufficient, and it is the defendants' burden to establish

10:27:23 the complaint's insufficiency.

Turning then to the analysis of the individual claims. Beginning with some points about the ultrahazardous and negligence-based claims, so that would be Counts I, II, III and VII, defendants contend that the named plaintiffs

10:27:51 cannot recover on any of their negligence-based claims, meaning negligence, negligent infliction of emotional distress, trespass to the extent that's based in negligence, private nuisance, and medical monitoring, and their claim for ultrahazardous activity.

10:28:10 Defendants contend that, under Illinois law, a plaintiff may not recover damages under a negligence theory or strict liability without a present injury. Defendants contend that plaintiffs here have alleged only increased risk of future harm without any alleged present harm. According to

10:28:31 defendants, mere exposure to a hazardous substance is not a

present injury under Illinois tort law.

In response, plaintiffs argue that defendants' argument for dismissal depends on defendants' own version of the facts that contradicts the complaint and that that approach is improper at the motion to dismiss stage and, in and of itself, warrants denial of the motion to dismiss. Plaintiffs contend that they have alleged injuries to their persons and property, and they contend that the complaint alleges all the elements of a negligence claim under Illinois law.

Plaintiffs contend that defendants have imposed a far too stringent pleading standard. They also argue that Illinois law recognizes exposure to harmful substances as an injury.

I'll start with the plaintiffs' negligence count and then address defendants' other arguments that all negligence-based counts and the strict liability claim must also be dismissed.

So starting with negligence, Count II, defendants contend that the named plaintiffs here have not alleged a present physical injury sufficient to assert a negligence claim under Illinois tort law. Neither Jose Solis nor Juan Rangel has alleged that they were physically harmed by defendants' alleged negligence. Only Antonio Solis alleges to have come into contact with the dust and suffered physical

side effects after that contact.

Jose Solis alleges that the dust invaded his property and accumulated in his home.

Juan Rangel and Antonio Solis allege that they are property owners in Little Village and that the remnants of the dust cloud coated their neighborhoods. These allegations -- so Antonio Solis is alleging physical side effects. Juan Rangel and Jose Solis are alleging that they are property owners and that the remnants of the dust cloud coated their neighborhood.

So there are different types of allegations here as between the plaintiffs, but these allegations are sufficient to state claims for negligence.

Negligence requires duty, breach, causation, and damage. Damage can be -- there can be either damage, personal-injury-type damage, or there can be property damage. *See Clancey v. McBride*, 388 Illinois 35, 38 (1929); *see also Dargie v. East End Bolders Club* 346, Ill. App. 480, 491 (1952). So there can be -- there can be negligence claims either for injury to person or injury to property.

Under Illinois law, when a plaintiff's negligence claim is premised upon injury to person, a plaintiff must allege a present physical injury. In that circumstance, it is not sufficient for a plaintiff to allege an increased risk of future harm. In *Berry v. City of Chicago*, 2020 IL 124999, the

Illinois Supreme Court analyzed its prior decisions and held that "an increased risk of harm is not itself an injury" for purposes of tort law. *Berry*, 2020 IL 124999, paragraph 33. See also paragraph 38.

10:32:29 More precisely, *Berry* held: "A plaintiff who suffers bodily harm caused by a negligent defendant may recover for an increased risk of future harm as an element of damages, but the plaintiff may not recover solely for the defendant's creation of an increased risk of harm." *Berry*, 2020 10:32:54 IL 124999, paragraph 38. *See also Williams v. Manchester*, 228 Ill.2d 404, 425 (2008).

At least one other court in this district has applied *Berry* in an analogous context and has concluded that a plaintiff must allege a present physical injury to support a 10:33:17 negligence claim, again, when the negligence claim is a personal -- a claim for personal injury. *Leslie v. Medline Industries*, 2021 WL 4477923 (N.D. Ill., September 30, 2021), read *Berry* as requiring that "in a negligence action, a plaintiff must allege a present physical injury, especially to 10:33:48 recover damages for future harm connected to that injury." *Id.* at *9.

So applying these principles here with respect to Antonio Solis's claim, the complaint alleges that Antonio Solis was in his house when the dust cloud from the demolition 10:34:09 "descended" and that the dust "seeped" into his home. Docket

13, paragraph 10. Antonio Solis alleges that he "later experienced headaches when he went outside as well as a sore throat." *Id.*

Accepting these allegations as true and drawing all
10:34:32 reasonable inferences in Antonio Solis's favor, these allegations are sufficient to allege that Antonio Solis suffered a physical injury in the immediate aftermath of the demolition due to the dust cloud and that this injury may have been caused by defendants' negligent conduct.

10:34:49 Defendants allege that Antonio Solis's injuries are *de minimis* and insufficient to establish the present physical injury requirement of an Illinois tort claim. They cite *Sondag v. Pneumo Abex Corp.*, 2016 IL App (4th) 140918, in which a plaintiff claimed that defendant's tape contained
10:35:13 asbestos and caused him to develop pleural plaques and interstitial fibrosis. However, that case I believe is distinguishable in that it was first -- it involved products liability claims, and so that is -- that is one distinction.

It also was decided on appeal from the denial of a
10:35:39 motion for a directed verdict, and that's apparent from paragraph 1 of the case, which refers to the evidence before the jury. And so contrary to defendant's assertion, *Sondag* does not stand for the broad proposition that plaintiffs must allege facts at the pleading stage establishing that they
10:36:06 suffered from some significant ongoing or chronic harm.

Sondag appears to have addressed a specific question related to products liability actions and at a later stage than we are -- this motion is at in this case.

Defendants also argue that the plaintiffs' alleged injury must be ongoing. However, while *Berry* requires that a plaintiff must plead a present injury in order to recover damages for an increased risk of future harm, *Berry* does not necessarily require plaintiffs' present injury to be ongoing. See *Berry* at paragraph 38. Defendants argue that Antonio Solis's injuries are *de minimis*, are not ongoing, and do not create a risk of future harm, but these issues are not appropriate for resolution at the pleading stage because they relate to the question of Antonio Solis's damages rather than failure to plead a negligence claim.

Furthermore, defendants have not cited case law from Illinois suggesting that even minor *de minimis* injuries are insufficient to state a claim for negligence.

Also, Illinois requires fact pleading, a more rigorous standard than federal notice pleading. *Custom Classic Automobiles v. Axalta Coating Systems*, 2020 WL 7319569 at *4, note 8, (N.D. Ill. December 11, 2020), but in federal court, federal pleading standards apply. *See Windy City Metal Fabricators v. CIT Tech Financial Services*, 536 F.3d 663, 670 (7th Cir. 2008). At this stage, all that Antonio Solis must plead is that he suffered a present injury attributable to the

defendants' negligent conduct, which he has.

Additionally, Antonio Solis, Jose Solis, and Juan Rangel all allege that they are property owners in Little Village. A claim for negligence can be supported, as I mentioned earlier, based upon damage to person or damage to property. While the complaint does not allege that Jose Solis has suffered any physical injury from the dust cloud, it does allege that the dust "left a thick residue in and around his home." Docket 13, paragraph 11. The complaint further alleges that "the dust has even penetrated inside the homes of community members, requiring significant cleaning just to make those residences safe and habitable." Paragraph 73.

Again, construing these facts in the light most favorable to plaintiff, it is plausible that the defendants' negligent actions caused damage to Jose Solis's property by leaving a layer of dust in and around his home that required significant cleanup.

As to plaintiffs Antonio Solis and Juan Rangel, both allege that they are property owners and that dust accumulated in their neighborhoods. Drawing all reasonable inferences in their favor, these allegations are also enough for me to infer that the dust coated their properties and caused damage.

In short, as to Count II, which is negligence, the motion to dismiss is denied with respect to all plaintiffs.

Defendants contend that if plaintiffs' negligence

claim fails, then all other claims with negligence as an element, as well as plaintiffs' strict liability claim, must also be dismissed. This would pertain to Counts I, III, IV and V. Plaintiffs contend that defendants waived this
10:40:04 argument by not sufficiently developing it in their briefs.

However, because I have found and as I've just explained, all plaintiffs have pleaded enough to state claims for negligence, there is no reason to reach this dispute, and so the argument that plaintiffs have failed to plead lack of
10:40:23 damages sufficient to state a negligence claim is not a basis to dismiss any of the other negligence-based claims or plaintiffs' strict liability claim.

Turning next to Count III, which is the negligent infliction of emotional distress claim. Defendants argue that
10:40:43 plaintiffs failed to state a claim for negligent infliction of emotional distress, which I'll refer to as NIED, because plaintiffs have not suffered a physical injury or impact.

Plaintiffs respond that a direct-victim NIED claim requires either contemporaneous physical impact or injury, not
10:41:03 both. Docket 93 at page 27. They contend that they have alleged physical injuries to their persons and property caused by the defendants' toxic dust cloud and that there can be no reasonable dispute that the complaint, taken as true, alleges that plaintiffs suffered a contemporaneous physical impact
10:41:24 sufficient for direct-victim NIED liability by coming in

contact with the dust plume. *Id.* at 27.

Plaintiffs further argue that because they have alleged a physical impact from the dust cloud, they were not also required to allege physical injury resulting from the distress caused by defendants' negligent conduct. *Id.* at 28.

Both parties concede that plaintiffs are proceeding under a direct-impact NIED theory rather than a bystander theory. However, the plaintiffs seem to dispute the current state of law on the physical impact or injury requirement of direct-impact NIED claims.

The parties' briefs primarily rely on three Illinois Supreme Court cases to make their respective arguments: *Rickey v. Chicago Transit Authority*, 98 Ill.2d 546 (1983), *Pasquale v. Speed Products Engineering*, 166 Ill.2d 337 (1995), and *Schweihs v. Chase Home Finance*, 2016 IL 120041.

Rickey and *Pasquale* concerned plaintiffs proceeding under bystander NIED theories. *Rickey* held that a bystander who was in a zone of physical danger and who, because of the defendant's negligence, has reasonable fear for his own safety has a cause of action for physical injury or illness resulting from emotional distress. "This rule does not require that the bystander suffer a physical impact or injury at the time of the negligent act, but it does require that he must have been in such proximity to the accident in which the direct victim was physically injured, that there was a high risk to him of

physical impact. The bystander, as stated, must show physical illness or illness as a result of the emotional distress caused by the defendant's negligence." 98 Ill.2d at 555.

10:43:30 *Pasquale*, however, concerned a case of strict liability, not negligence. It reaffirmed the Illinois rule that "there exists in Illinois no recovery for emotional distress under a theory of strict liability." 166 Ill.2d at 321.

10:43:51 Schweihs clarified the state of the law on NIED direct-impact claims. The Illinois Supreme Court held that "precedent makes clear that a direct victim's claims for negligent infliction of emotional distress must include an allegation of contemporaneous physical injury or impact ... this court did not eliminate the impact rule for negligent 10:44:11 infliction of emotional distress claims brought by direct victims." 2016 IL 120041, paragraph 38.

Thus, Illinois law does require that direct-impact victims allege a contemporaneous physical injury or physical impact. The question then is whether plaintiffs' complaint 10:44:47 alleges either one of those. Neither party cites good case law on what Illinois courts consider a physical impact or sufficient physical injury to support an NIED claim.

Defendants point out that the U.S. Supreme Court in *Metro-North Commuter Railroad Company v. Buckley* held that 10:45:14 under the Federal Employers Liability Act, or FELA, an NIED

plaintiff's long exposure to asbestos dust did not constitute physical impact as that term was used in another court decision interpreting FELA. 521 U.S. 424, 432 (1997). While *Buckley* presents a compelling case for why the term "physical impact" under traditional tort law does not encompass contact that amounts to no more than an exposure, *id.*, Illinois law allows an NIED claim where a plaintiff suffers a physical impact or physical injury. *Schweihs*, 77 N.E.3d at 58.

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Here, applying federal pleading standards and drawing all reasonable inferences in favor of plaintiffs, Antonio Solis has sufficiently pleaded a physical injury from the defendants' negligent conduct. He alleges that he suffered physical symptoms -- headache and sore throat -- in the immediate aftermath of being exposed to defendants' dust cloud caused by defendants' negligence.

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As to Jose Solis and Juan Rangel, however, the complaint does not allege that they ever came into direct contact with the dust cloud or suffered any physical injury because of it. While plaintiffs attempt to rely on the more general allegations of the harm that the dust cloud caused to residents of Little Village as a whole, at this stage in the proceedings, Jose Solis and Juan Rangel must rely on the specifics of their own experience in order to survive the motion to dismiss.

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And Count III is dismissed without prejudice with

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respect to Jose Solis and Juan Rangel.

Turning to medical monitoring, Count VII. Defendants argue that medical monitoring is not an independent tort in Illinois. Plaintiffs state that although defendants may be 10:47:26 correct that the Illinois Supreme Court has not yet weighed in on whether this unbroken line of cases recognizing medical monitoring claims under Illinois law is correct, defendants do not suggest that the Illinois Supreme Court has ever questioned the existence of such a claim either.

10:47:44 Medical monitoring is not an independent claim under Illinois law but is a form of damages that a plaintiff who asserts a successful negligence claim may seek.

In the *Berry* case, the Illinois Supreme Court said, "Simply pleading a need for medical monitoring prompts the 10:48:03 question: Why is medical monitoring needed? Plaintiffs themselves allege in their complaint that the need for medical monitoring is based on their increased risk of harm." Without an increased risk of future harm, plaintiffs would have no basis to seek medical monitoring. In other words, plaintiffs' 10:48:20 allegation that they required diagnostic medical testing is simply another way of saying they have been subjected to an increased risk of harm, and in a negligence action, an increased risk of harm is not an injury.

"A plaintiff who suffers bodily harm caused by a 10:48:38 negligent defendant may recover for an increased risk of

future harm as an element of damages, but the plaintiff may not recover solely for the defendant's creation of an increased risk of harm." That's from *Berry*, 2020 IL 124999 at paragraphs 37 to 38, and in particular that portion of that
10:48:59 quotation that says that a plaintiff who suffers bodily harm caused by a negligent defendant may recover for an increased risk of future harm as an element of damages, but the plaintiff may not recover solely for the defendants' creation of an increased risk of harm.

10:49:16 If a plaintiff's negligence claim failed in *Berry* because risk of future harm is merely an element of damages and is not an injury in and of itself, then as a matter of logic, medical monitoring cannot be an independent tort.

Plaintiffs' brief argues that courts have repeatedly
10:49:35 recognized that Illinois permits medical monitoring claims as an independent tort, see docket 93 at page 30, and then includes a long string cite of cases. However, all of these cases were decided pre-*Berry*. Nor did any of them explicitly recognize medical monitoring as an independent cause of
10:49:51 action.

To be clear, this is not to say that a plaintiff like Antonio Solis who has alleged a negligence claim based on a physical injury cannot recover as a form of damages medical monitoring. So, again, there's not a rule that bars a
10:50:15 plaintiff like Antonio Solis from seeking medical monitoring

as a form of damages, but medical monitoring itself is not an independent claim that -- or independent count that plaintiffs can bring as an independent, free-standing claim.

And so the medical monitoring claim, Count VII, is dismissed without prejudice for all plaintiffs.

And I also would add that other plaintiffs, like Jose Solis and Juan Rangel, have not suffered physical injury, and so I -- I guess I would question whether, you know, under the language in *Berry,* whether those types of plaintiffs could recover because, again, *Berry* says a plaintiff who suffers bodily harm caused by a negligent defendant may recover for an increased risk of future harm as an element of damages. So the premise of that language is that it is a plaintiff who suffers bodily harm that can seek damages for medical monitoring.

Turning to ultrahazardous activity, which is Count I, defendants argue that plaintiffs have failed to state an ultrahazardous activity claim. They claim that because the complaint alleges that the smokestack could have been demolished in a safe manner -- i.e., with the exercise of reasonable care -- plaintiffs cannot, as a matter of law, state a claim for strict liability.

Plaintiffs respond that they have adequately alleged a strict liability claim, that the Restatement factors do support their claim, and that this Court should not dismiss

the strict liability claim merely because plaintiffs have also alleged a negligence claim.

They argue that even if they could not ultimately succeed on their strict liability claim, they are entitled to plead alternative theories of relief.

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Plaintiffs could not ultimately recover under both a theory of negligence and strict liability. *See Indiana Harbor Belt Railroad Company v. American Cyanamid Company*, 916 F.2d 1174, 1179 (7th Cir. 1990); *see also Nave v. Rainbo Tire Service*, 123 Ill. App. 3d, 585, 591 (1984).

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But plaintiffs are entitled to plead alternative theories of relief at the pleading stage, regardless of consistency. *See* Federal Rule of Civil Procedure 8(d)(3); *see also Lindgren v. More*, 907 F.Supp. 1183, 1190 (N.D. Ill. 1995).

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Defendants rely on *Campos v. BP Products*, 2014 WL 5858625 (N.D. Ill., November 12, 2014), where plaintiffs allege both strict liability and negligence claims against defendants who sold and stored petcoke, a dust-like byproduct of crude oil refining. The court dismissed because plaintiffs' strict liability claim because plaintiffs have not alleged that petcoke can never be stored safely -- to the contrary, they allege that enclosing, covering, or spraying petcoke with water would reduce the likelihood of harm. *Id.* at 8.

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Here, defendants point to two paragraphs in plaintiffs' complaint, paragraphs 93 and 94, and argue that plaintiffs allege that adequate controls could have been put in place to eliminate emission of dust. Docket 76 at page 27. But plaintiffs' complaint actually states that each of the defendants knew or should have known that the demolition and disposal would generate large amounts of dust laden with harmful substances, that such dust would be geographically disseminated by wind, and that such dust would likely be carried to the plaintiffs' properties and residences and expose the plaintiffs if not adequately controlled. Docket 13, paragraph 93.

Unlike in *Campos*, plaintiffs have not definitively pleaded themselves out of a strict liability claim by alleging that there was actually a safe way to conduct the demolition. And, again, plaintiffs can proceed on both theories regardless of their consistency, and so I will not dismiss the ultrahazardous activity claim merely because plaintiffs have also alleged negligence.

Ultimately, disposition of the ultrahazardous activity claim is not appropriate at the pleading stage. Because this question turns on a myriad of Restatement factors, this question is better left for summary judgment after the parties have developed the record.

Whether an activity is ultrahazardous and subjects

the defendant to strict liability depends on six factors: (a) existence of a high degree of risk of some harm to the person, land, or chattels of others; (b) likelihood that the harm that results from it will be great; (c) inability to eliminate the
10:55:42 risk by the exercise of reasonable care; (d) extent to which the activity is not a matter of common usage; (e) inappropriateness of the activity to the place where it is carried on; and (f) extent to which its value to the community is outweighed by its dangerous attributes. *In re Chicago Flood Litigation,* 680 N.E.2d 265, 279 (Ill. 1997).

Defendants are correct that whether an activity is abnormally dangerous is a question of law. *See American Cynamid*, 916 F.2d at 1176. Defendants argue that courts routinely dismiss ultrahazardous activity claims where the
10:56:22 complaint alleges that the activity can be made safer by the exercise of care. They primarily rely on *American Cynamid* on this point. But *American Cynamid* was resolved on appeal from a grant of summary judgment. 916 F.2d at 1175 to 76.

It's true that *American Cynamid* reiterated that
10:56:43 questions of strict liability are questions of law resolved by the Court, but the case does not suggest that courts must resolve the question at the pleading stage. To the contrary, the decision left open the possibility that there could be questions of fact related to determinations of strict
10:56:57 liability. *Id.* at 1182.

In short, while it is true that some federal courts resolve this question at the pleading stage, *see Dominick's Finer Foods v. Amoco Oil*, No. 93 C 4210, 1993 WL 524808, (N.D. Ill. December 15, 1993), there is no rule requiring that this question be resolved now.

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The parties vigorously debate the Restatement factors, but many of these factors depend upon factual questions that I cannot resolve at the pleading stage and that would be better left until there is a full record. And while ultimately whether defendants engaged in an ultrahazardous activity is a question of law, I'm not prepared to say that defendants' activity here was not ultrahazardous without further development of the record.

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It is also not the case that, as a matter of law, demolition is per se not an ultrahazardous activity. Defendants' briefing relied significantly on *Great American Insurance Company of New York v. Heneghan Wrecking and Excavating Company*, 2015 IL App (1st) 133376. There, the Illinois appellate court found, after applying the Restatement factors, that in the circumstances of that case, the demolition of a building did not support a finding of strict liability. *Id.*, paragraph 38. The court's determination was highly dependent on the specific facts and circumstances of that case. *Great American* also was resolved on an appeal from a summary judgment order.

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In short, plaintiffs have adequately pleaded a claim for ultrahazardous activity, can proceed under both a theory of negligence and the theory of strict liability, and I will not definitively resolve the question of whether defendants 10:58:48 engaged in an ultrahazardous activity at this point in the litigation.

So the motion is denied with respect to Count I for all plaintiffs.

Turning to assault and battery, which is Count VI. 10:59:01 Defendants next argue that plaintiffs failed to state claims for assault and battery because the complaint fails to allege that defendants intended plaintiffs to be touched by dust or intended to create a reasonable fear of an imminent touching. According to defendants, both assault and battery require a 10:59:18 showing of malice, and because the complaint alleges that defendants took steps to prevent the spread of dust, defendants could not have also intended for the plaintiffs to have been touched by the dust. Defendants also argue that for the battery claim, being touched by dust is not physical 10:59:36 contact.

Plaintiffs respond that Illinois law does not require malice but merely requires that defendants acted willfully and wantonly in causing the harmful contact. Plaintiffs argue that they have pleaded the necessary mental state to support 10:59:49 their assault and battery claims because the complaint alleges

that defendants acted deliberately in exposing the plaintiffs to harmful substances and with blatant disregard for the consequences of their action.

Plaintiffs have not pleaded sufficiently a claim for assault and battery.

Beginning with battery: Battery is an intentional tort. *Fiala v. Bickford Senior Living Group*, 2015 IL App (2d) 150067, paragraph 20. "Battery is defined as the willful touching of another person. ... The touching may be by the aggressor or a substance or force put in motion by the aggressor. ... An action for battery does not depend on the hostile intent of the defendant but on the absence of the plaintiff's consent of the contact. ... To be liable for battery, the defendant must have done some affirmative act intended to cause an unpermitted contact." *Pechan v. DynaPro, Inc.*, 251 Ill. App. 3d 1072, 1084 (1993). "The element of intent is defined in at least two ways: Either an intent to touch or an intent to harm or offend by the touch." *Fiala,* 2015 IL App (2d) 150067, paragraph 20. "The gist of the action for assault and battery is malice, which implies a wrong inflicted on another with evil intent or purpose." *Mitchell v. United States*, 2005 WL 2850113 at *2 (N.D. Ill., October 26, 2005).

Plaintiffs rely on a case from 1946, *Smith v. Georgeoff,* 329 IL App. 444 (1946), to support the proposition

that, for a battery claim, "proof of express malice is unnecessary and malice can be inferred from wanton and willful or reckless disregard of the plaintiff's rights." However, *Smith* concerned a case in which a tavern owner violently threw
11:01:52 out a patron, and the patron sustained injuries. *Id.* at 446. The patron sued, alleging claims for assault and battery. In the trial court, defendant alleged a defense that a tavern owner is permitted to throw out an inebriated patron, but lost at trial and appealed. *Id*. The Illinois appellate court
11:02:12 determined that a tavern owner is allowed to throw out inebriated patrons but may only use as much force as is reasonably necessary to do so and held that the evidence in this case indicated that more force was used than was necessary. *Id.* The court stated: "While it is true that
11:02:29 proof of acts negligently done will not sustain a charge of assault and battery, the evidence in the instant case shows conduct which is much stronger than a mere negligent attempt to eject plaintiff. Similarly, proof of express malice is unnecessary, and malice can be inferred from wanton and
11:02:46 willful or reckless disregard the plaintiff's rights." *Id.* at 447.

Smith reflects that the evidence in that case was enough to support a judgment that the defendant did indeed batter the plaintiff by using more force than necessary to
11:03:01 eject plaintiff from defendant's tavern. Such a judgment

could be supported by proof that a defendant acted in wanton and willful disregard for a plaintiff's rights. But *Smith* did not supplant the general rule that battery is an intentional tort and requires that a defendant "must have done some affirmative act, intended to cause an unpermitted contact." *Mink v. University of Chicago*, 460 F. Supp. 713, 717 (N.D. Ill. 1978); *Pechan,* 251 Ill. App. 3d at 1084.

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On this point, Pechan is instructive. There, a plaintiff sued her ex-employer, alleging battery due to injuries sustained from secondhand smoke. 251 Ill. App. 3d at 1074. The defendant employer allowed employees to smoke at its facility, and Illinois law permits claims against an employer for intentional injuries where the employer "expressly authorizes" the injurious activity. *Id.* at 1084.

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In determining whether plaintiff's battery claim was properly dismissed for failure to state a claim, the appellate court noted that "the cause of action for express authorization to commit battery hinges on the intents of the employee smokers. We must decide whether the employees who smoked did so with the intent that the emitted smoke touched nonsmokers such as Pechan." *Id.*

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The court ultimately deferred the dismissal of the claim because "the act of smoking generally is not done with the intent of touching others with emitted smoke. Pechan has not alleged that any of the office's smokers intended that she

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be exposed to their smoke or that reasonable persons should have known that their smoke would have contacted Pechan in sufficient quantity to reasonably cause the damages claimed." *Id.* at 1085 to 86.

11:05:01 In short, although plaintiffs' briefing argues otherwise, battery in Illinois does require an allegation of intent to cause offensive contact. *See also Censke v. United States,* 27 F. Supp. 3d 920, 932 (N.D. Ill. 2014).

Here, plaintiffs have not pleaded intent, nor have 11:05:20 they pleaded factual content that would allow a reasonable inference that defendants intended to cause offensive contact when they undertook the demolition of the smokestack.

While the complaint alleges that the defendants did not utilize adequate containment measures to prevent the dust 11:05:38 cloud from spreading, these allegations by themselves do not give rise to a reasonable inference that defendants acted with the intent of causing offensive bodily contact. Moreover, the complaint does not allege that defendants' failure to use adequate containment measures occurred with the intent of 11:05:56 causing plaintiffs' offensive bodily contact.

The count for battery alleges: "The manner in which the demolition and disposal of the Crawford Coal Plant site was conducted on April 11, 2020, released dust and other particulate matter into the Little Village community. 11:06:19 Residents of Little Village, including the named plaintiffs

and class members, were forced to breathe the dust and particulate matter. This action, taken willfully by the defendants in a manner described more fully throughout this complaint, constituted contact by the defendants to which plaintiffs did not consent." Docket 13, paragraph 115. And so that language says "taken willfully".

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The battery count does not allege that the defendants undertook the demolition with the intent of causing harmful bodily contact to plaintiffs. Instead, it alleges that defendants intentionally demolished the smokestack. It is true that under the federal pleading standards, no magic words are necessary to state a claim, but here plaintiffs have alleged, again, that defendants intentionally demolished the smokestack, but have not alleged that defendants did so with the actual intent of bringing about offensive bodily contact with plaintiffs. Plaintiffs' complaint stops short of alleging that defendants undertook any of these actions with the intent of causing plaintiffs offensive bodily contact.

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Because plaintiffs have not pleaded intent, there is no need to reach defendants' additional argument that contact with the dust does not constitute contact for purposes of a battery claim.

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Turning to assault, "An assault can be defined as an intentional, unlawful offer of corporal injury by force, or force unlawfully directed, under such circumstances as to

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create a well-founded fear of imminent peril, coupled with the apparent present ability to effectuate the attempt if not prevented." *Parrish v. Donahue*, 110 Ill. App. 3d, 1081, 1083 (1982).

11:08:02 For the same reasons plaintiffs have not alleged intent in their battery claims, they also have not alleged the required intent to plead an assault claim.

So Count VI, which alleges assault and battery, is dismissed without prejudice in its entirety for all

11:08:16 plaintiffs.

Turning to trespass, which is Count V. Defendants argue that plaintiffs' trespass claim, whether based in negligence or alleged as intentional tort, fails. As for intentional trespass, defendants contend that plaintiffs

11:08:29 failed to allege that defendants intended to send dust onto plaintiffs' property. And to the extent that the trespass count alleges negligent trespass, defendants also urge dismissal of the trespass count on the ground that it is duplicative of plaintiffs' negligence claim.

Plaintiffs argue against dismissal of this count because, according to plaintiffs, plaintiffs' theory of intentional trespass is straightforward. Plaintiffs allege that defendants knew that their uncontrolled demolition would cause harmful substances to invade plaintiffs' property,

11:09:01 proceeded with the demolition anyway, and thereby caused such

an invasion to occur. Plaintiffs argue that defendants knew with a high degree of certainty that their actions would lead to the intrusion of the property of Little Village residents, including plaintiffs.

11:09:14 Plaintiffs also assert that a claim for negligent trespass would not be duplicative of the negligence count because, in a negligent trespass action, the focus of the inquiry, according to plaintiffs, is on the foreseeability of the invasion onto the property. Plaintiffs contend that if 11:09:31 such a negligent intrusion is shown, the plaintiff can recover for actual damages proximately caused by the ultimate intrusion, even if the chain of causation between the original negligent act and the downstream harm would be too attenuated in a generic negligence action.

11:09:48 The complaint here does not specify whether the claim for trespass sounds in negligence or intent. Illinois law recognizes a tort for intentional trespass and negligent trespass. *Dial v. City of O'Fallon*, 81 Ill.2d 548 (1980), said, "The conduct which today forms the basis of liability 11:10:13 for the invasion of the interest in the exclusive possession of land may be of three general types: (1) conduct intended to cause an intrusion on the plaintiff's premises; (2) negligent conduct that causes an intrusion; and (3) conduct that is ultrahazardous and causes an intrusion, so that 11:10:30 liability is said to be strict or absolute. The second type

of invasion listed above is now governed by the general principles of negligence, and the third is thought of as included in the principles governing extrahazardous conduct, leaving only the first type of invasion wherein recovery may be sought purely on the basis of the tort of trespass." *Dial,* 81 Ill.2d at 553.

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Turning first to intentional trespass, "Trespass is an intentional invasion of the exclusive possession and physical position of land. ... One can be liable in trespass for an intrusion by a thing or third person if he acts with knowledge that his conduct will, to a substantial degree of certainty, result in the intrusion. ... In other words, a person must know with a high degree of certainty that the intrusion will naturally follow from his act before liability for trespass attaches." *Freese v. Buoy*, 217 Ill. App. 3d, 234, 244 (1991).

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Plaintiffs agree that intentional trespass under Illinois law requires a high degree of certainty that an intrusion of another's property will result from the act of the defendant. Docket 93 at pages 46 to 47. Plaintiffs point to paragraphs 91 to 93 of the complaint, which they contend allege in no uncertain terms that defendants knew with a high degree of certainty that their actions would lead to the intrusion upon plaintiffs' property.

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However, paragraphs 91 to 93 allege more generally

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that the defendants knew or should have known that their actions would have caused damage from the dust cloud. Those paragraphs do not contain allegations giving rise to a plausible inference that defendants knew with a high degree of
11:12:14 certainty that their actions would have caused an intrusion upon plaintiffs' property.

Moreover, the allegations in paragraphs 110 to 113 related to the trespass count generally allege: (1) that defendants' demolition and disposal caused the dust cloud that
11:12:32 invaded plaintiffs' property, paragraph 11; (2) that defendants are aware that they caused the disposal and invasion of the dust on plaintiffs' properties but have failed to remove the dust, paragraph 112; and (3) that the discharge of dust was unreasonable and unlawful and has interfered with
11:12:48 plaintiffs' use and enjoyment of their properties. Paragraph 113.

However, even assuming all the facts alleged in the complaint are true and taking all reasonable inferences in plaintiffs' favor, the complaint falls short of alleging a
11:13:01 high degree of certainty on defendants' part that their actions would have caused an intrusion upon plaintiffs' property.

And so the trespass claim is dismissed without prejudice for all plaintiffs to the extent that it alleges a
11:13:12 claim for intentional trespass.

Turning to negligent trespass, defendants urge dismissal of plaintiffs' trespass claim to the extent it is based in negligence as duplicative of plaintiffs' negligence claim.

11:13:27 It is sometimes the case that courts will dismiss or strike duplicative claims if they contain the same factual allegations and the same injury. *Meadoworks v. Linear Mold & Engineering,* 2020 WL 419422 at *2 (N.D. Ill. July 21, 2020). However, it is unclear whether negligence and negligent

11:13:50 trespass are truly one and the same claim under Illinois law.

There is one case that suggests that negligent trespass in Illinois is generally governed by the principles of negligence, and that is the *Dial* case that I cited earlier, so *Dial v. City of O'Fallon*, 81 Ill.2d 548, 553 (1980).

11:14:19 And *Dial* said, as I mentioned before, that the second type of invasion listed above is now governed by the general principles of negligence, and that -- that statement in *Dial* is referring back to negligent conduct that causes an intrusion. So based on that language from *Dial*, there is some

11:14:49 argument that it's effectively the same claim, meaning negligence and negligent trespass are effectively the same claim.

On the other hand, when you continue reading in *Dial* to the next paragraph, *Dial* turns to the Restatement Second of

11:15:09 Torts, and it cites the Restatement Second of Torts

Section 165 for the point that one is liable for negligent or reckless intrusion on land if he thereby causes harm to a legally protected interest, and the Restatement Section 165 that *Dial* cites is a portion of the Restatement that addresses
11:15:43 liability for intrusions resulting from reckless or negligent conduct and abnormally dangerous activities. So it's a portion of the Restatement that specifically focuses on trespass type -- or on intrusions, so it's just not clear from *Dial* whether, on the one hand, *Dial* was saying that negligent
11:16:13 trespass is subsumed into negligence generally, or whether *Dial* was saying that negligent trespass claims continue to be governed by this Restatement, Section 165, which looks to be geared particularly to intrusions, in other words, trespasses, not negligence generally.

11:16:34 So *Dial* itself is not entirely clear on this, and defendants have cited no Illinois case law holding that a plaintiff cannot, as a matter of law, plead both a negligence claim and a negligent trespass claim. It is defendants' burden to establish that they are entitled to the relief that
11:16:54 they are requesting, meaning dismissal of the negligent trespass count as duplicative of negligence, and defendants have not carried this burden here.

Accordingly, this claim will not be dismissed or stricken with respect to any plaintiff. All plaintiffs have
11:17:08 alleged that they own property in Little Village and that the

dust accumulated in their neighborhoods. Jose Solis specifically alleges that the dust invaded his property. These allegations are sufficient to infer that -- or to state a plausible claim that defendants' negligent conduct caused an
11:17:26 invasion of the plaintiffs' property.

Now, if the claims are ultimately seeking -- are presenting different theories of relief for the same damages, then, of course, there cannot be a double recovery based on multiple theories of relief, but that is not an issue that I
11:17:47 need to address at this point.

So the motion to dismiss is denied with respect to Count V, trespass, to the extent that that claim sounds in negligence.

Turning to private nuisance, which is Count IV,
11:18:02 defendants argue for dismissal of plaintiffs' private nuisance because (1) plaintiffs have alleged only *de minimis* injuries from the dust and not a substantial invasion of their properties, according to defendants; (2) again, according to defendants, plaintiffs did not allege that defendants
11:18:16 intentionally sought to disturb their enjoyment of their properties; (3) any private nuisance claim based on negligence is duplicative of plaintiffs' negligence claim; and (4) defendants' actions were reasonable.

Plaintiffs respond that they are misapplying federal
11:18:32 notice pleading standards, that plaintiffs have pleaded

adequate damages to their property, and that they have pleaded a private nuisance claim based on both negligence and intent.

Plaintiffs may proceed on a negligent private nuisance claim.

11:18:46 "A private nuisance is a substantial invasion of another's interest in the use and enjoyment of his or her land. ... The invasion must be either intentional or negligent and unreasonable. ... In determining whether particular conduct constitutes a nuisance, the standard is the conduct's 11:19:01 effect on a reasonable person. ... The Illinois Supreme Court has frequently stated that a nuisance must be physically offensive to the senses to the extent that it makes life uncomfortable. ... An invasion constituting a nuisance can include noise, smoke, vibration, dust, fumes, and odors 11:19:18 produced on the defendants' land and impairing the use and enjoyment of neighboring land. ... Whether the complained-of activity constitutes a nuisance is generally a question of fact. *Dobbs v. Wiggins,* 401 Ill. App. 3d 367, 375 to 76 (2010).

11:19:31 A claim for negligent private nuisance is not duplicative of a negligence claim. The elements of a private nuisance claim are slightly different from a general negligence claim because a private nuisance claim requires that an intrusion not only be undertaken negligently, but also 11:19:51 must be physically offensive to a reasonable person.

Furthermore, defendants complain or argue that plaintiffs have alleged only *de minimis* injuries. While it is true that a private nuisance claim requires a substantial invasion of property, this is a question for the trier of fact. Defendants specifically rely on *In re Chicago Flood Litigation*, 176 Ill.2d 179, 203 (1997), which stated that "the conclusory allegation of unspecified property damage is insufficient to show that their damages are recoverable in tort and cannot withstand a motion to dismiss." However, it is not clear that that court made the statement with respect to the substantial invasion element of private nuisance. Moreover, Illinois requires fact pleading, which is a more rigorous standard than federal notice pleading.

Similarly, whether defendants' demolition of the smokestack was reasonable is a question of fact that's not appropriate for disposition at the pleading stage. Defendants' reliance on *Great American* 2015 IL App (1st) 133376, is not persuasive because that case did not concern a private nuisance claim.

As to a claim for intentional private nuisance, for the same reasons that plaintiffs' trespass, battery, and assault claims did not plead intent, their private nuisance does not plead intent either. There are no allegations in the complaint suggesting that defendants acted with the intent of disturbing plaintiffs' enjoyment of their properties.

The claim for private nuisance, Count IV, thus survives for all plaintiffs, and the motion to dismiss that count is denied.

Turning to Title VI, which is Count VIII. Defendants contend that plaintiffs' Title VI claim must be dismissed because, according to defendants, (1) plaintiffs have failed to plead intentional discrimination, and (2) plaintiffs, again, according to defendants, have failed to allege that defendants received federal funding.

Title VI provides that "no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving federal financial assistance." And that is a quotation from 42 U.S.C. Section 2000d.

Title VI prohibits intentional discrimination. *Alexander v. Sandoval*, 532 U.S. 275, 280 (2001). "To state a claim under Title VI, plaintiffs must allege facts satisfying two elements: (1) that they have been intentionally discriminated against on the grounds of race; and (2) that defendants are recipients of federal financial assistance." *Khan v. Midwestern University,* 147 F.Supp.3d 718, 720 (N.D. Ill. 2015).

Taking all the allegations of the complaint as true, plaintiffs' allegations are not sufficient to draw a

reasonable inference that defendants intentionally discriminated against plaintiffs. While defendants' conduct -- or I'm sorry. The Rule 12(b)(6) plausibility inquiry is context specific. "It is rarely proper to draw
11:23:19 analogies between complaints alleging different sorts of claims; the type of facts that must be alleged depend on the legal contours of the claim." *EEOC v. Concentra Health Services*, 496 F.3d 773, 782 (7th Cir. 2007).

While defendants' conduct might have been negligent,
11:23:37 the complaint does not plausibly allege any type of intent on defendants' part to intentionally discriminate against plaintiffs.

The complaint lacks factual allegations giving rise to a plausible inference that defendants intentionally
11:23:54 discriminated against plaintiffs in demolishing the smokestack. The complaint alleges that defendants had knowledge that the Little Village has suffered historic environmental wrongs, a tragic and unfortunate circumstance, and the complaint alleges that the defendants were negligent in the demolition.

Nonetheless, the complaint does not plausibly allege that defendants undertook the demolition with the intent of discriminating against plaintiffs.

Because plaintiffs have not adequately pleaded a
11:24:25 Title VI claim on the issue of intent, there is no need to

reach the question of whether plaintiffs have sufficiently pleaded that defendants were recipients of federal funding. I would, however, note that I did see another case dismissing a Title VI claim on this basis for conclusory allegations on this point, which the sole allegation in this case on that point seems quite similar to the allegation in that case just in that both allegations were upon information and belief. And that case is *Shebley v. United Continental Holdings*, 2020 WL 2836796 at *5.

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And so Count VI -- or, I'm sorry -- Count VIII is dismissed without prejudice for all plaintiffs.

And to summarize then, and I gave a similar summary towards the beginning, but I'll just attempt to summarize again and to wrap up.

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So the motion, which is Docket 75, is granted in part and denied in part. Counts I, ultrahazardous activity; II, negligence; and IV, private nuisance, may proceed.

Count V, trespass, is dismissed without prejudice to the extent it sounds in intentional trespass, but the claim may go forward as a negligent trespass claim.

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Count VI, for assault and battery; VII, medical monitoring; and VIII, Title VI, are dismissed without prejudice in their entirety for all plaintiffs.

Count III, negligent infliction of emotional distress, is dismissed without prejudice as to plaintiffs Jose

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Solis and Juan Rangel but survives for plaintiff Antonio Solis.

Going forward then are the following claims: I, ultrahazardous -- I'm sorry. For plaintiff Antonio Solis: I, ultrahazardous activity; II, negligence; III, negligent infliction of emotional distress; IV, private nuisance; V, trespass in negligence.

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For Jose Solis: I, ultrahazardous activity; II, negligence; IV, private nuisance; V, negligent trespass.

For Juan Rangel: I, ultrahazardous activity; II, negligence; IV, private nuisance; V, negligent trespass.

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Again, all dismissals are without prejudice. Plaintiffs are given an opportunity to amend the complaint if they would like to do so.

The referral to Judge Harjani is expanded to include setting a deadline for amended pleadings. Again, I'll direct the parties to exhaust settlement possibilities in light of this ruling.

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And I will direct the parties to submit a joint status report on the status of the case generally, including settlement efforts, by six weeks from today, which is May 4th.

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And that concludes the ruling today. Thank you, everyone, for your time and for your participation. Take care.

MR. RAUSCHER: Thank you, your Honor.

11:28:15

MR. RYAN: Thank you, your Honor.

MR. DEVRIES: Thank you.

MR. LYMAN: Thank you.

(Which were all the proceedings heard.)

CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/Kathleen M. Fennell *March 30, 2022*

Kathleen M. Fennell Date
Official Court Reporter